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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1948.

No. 124

PAULINE RINN, as Executrix of the Estate of WALTER P. RINN, Deceased, CHARLES F. POGGE and RAYMOND C. POGGE,

Petitioners,

vs.

BROADWAY TRUST AND SAVINGS BANK, JUSTIN J. JAEGER, Receiver, ARTHUR G. STRASSHEIM, Liquidator, et al.,

Respondents.

REPLY TO THE BRIEF OF JUSTIN J. JAEGER, RECEIVER, RESPONDENT.

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I.

The existence of the federal question is not open to debate.

Respondent says (p. 1) that if petitioners had fully set forth the facts upon which the two decisions of the reviewing court were based, it would have been "ap parent" that no federal question is involved on review The respondent has supplied the alleged facts which are supposed to show that no federal question is involved.

An analysis of these facts discloses that the federal question exists and that its existence is not even open to debate. The assertion that the first appeal involved a construction of the allegations of the complaint as to "whether a cause of action was set up," is contradicted by the record which shows that the first appeal only involved the question of *jurisdiction* (Abst. 20; R. 108). The trial court had dismissed the action for *want of jurisdiction* on the ground that the cause of action was exclusively vested in the receiver under Section 11 of the Illinois Banking Act and not in the plaintiffs as stockholders, and the Appellate Court held in its first decision to the contrary, that the jurisdiction existed (326 Ill. App. 376).

Respondent reiterates the statement of the reviewing court that the decision on the first appeal is the law of the case on the second appeal, but the facts upon which the jurisdiction was sustained were different from the facts as proved, and says (p. 2) that in its first opinion, the court held that under the facts as then alleged, petitioners were entitled to relief, and that Section 11 of the Banking Act was no obstacle to the relief, but that on the second appeal the court held that petitioners did not prove that "All" depositors had been paid and that every obligation that had arisen out of "the banking business" had been satisfied, but on the contrary had shown that there were existing obligations. This was discussed in the petition and we have demonstrated (pp. 20-21) by the record that *all* liabilities that arose out of the banking business were satisfied and shown by the proof as alleged in the original complaint and that at the date of the filing of the complaint *all obligations were paid and satisfied,* with the exception of obligations that were allegedly incurred by the liquidator *which did not*

arise as the result of banking business, and which obligations were allegedly due to the officers and directors whose claims were allowed by the *ex parte order* in the proceedings of which *no notice was given* to the petitioners and *in violation of the status quo order,* and that these orders were void, and that the denial of any relief by reason of the void orders was a *denial of due process,* and that the federal question clearly exists here.

In summing up the argument, respondent says (p. 3) that the net result of the two decisions of the Appellate Court is that as long as a bank has unpaid creditors, the stockholders have no right to maintain the action under Section 11 of the Banking Act, but as soon as all creditors have been paid, the right of action accrues to the stockholders. We have shown that *all banking creditors* were paid in accordance with the opinion on the first appeal, and it follows that *even under the contentions of the respondent, the right of action was vested in the petitioners.* However, the respondent has *overlooked the main point* in the petition upon which the federal question was invoked. Petitioners have pointed out (pp. 24-25) that *jurisdiction is determined by the pleadings and not by the proof* and at the date of the entry of the orders allowing the claims without notice and in violation of the *status quo* order, the jurisdiction was *exclusively acquired by the court in petitioners' suit* to the exclusion of any other court, and that the entry of the orders in the proceedings subsequently commenced by the respondent were, therefore, void and of no force, and the decision of the reviewing court which held that these orders could not be challenged collaterally *deprived the petitioners of their property rights without due process of law. Shelley* v. *Kroener,* 334 U. S. 1, 17. The respondent is completely silent on this *pivotal point* upon

which the jurisdiction hinges, and the failure to answer this point may constitute a confession.

II.

The status quo order was violated.

Faced with a record which shows that an order that everything should remain in *status quo* was violated when the allowances of the claims were entered without notice, the respondent says (p. 3) that the orders questioned by the petitioners were not entered in violation of the *status quo* order because "all parties to the litigation acted as if the said *status quo* order had not been entered." By the term "all parties" he evidently includes the petitioners herein. He did not refer *to any part of the record where the petitioners obtained any orders in violation of the status quo order,* or where they had notice of the entry of such orders. To justify this statement, the respondent takes out a single sentence from the opinion of the Appellate Court which said, "The litigants appear to have forgotten an order theretofore entered that the assets should remain in *status quo,*" wherein the word "litigants" referred to the persons who obtained the entry of the orders and *not to the petitioners* who have never forgotten the entry of that order and who have always maintained that the order was violated. The use of the word "forgotten" in the Appellate Court opinion is not meant to be an exoneration for the violation of the order. The word "forgotten" in the opinion of the Appellate Court is used in the sense of "disregarded", or "neglected" and not in the sense of "overlooking" (*Brodbury* v. *Ins. Co.,* 118 Me. 191, 106 at 862, 863). At any rate, whether the word "forgotten" be considered as meaning "disregarded," "neglected," or "overlooked," the fact that the orders were entered

without notice and in violation of the order, *does not lend validity to the orders,* and the decision which affirmed the decree below on the ground that these orders were binding and conclusive on the petitioners clearly deprived them of their property rights without due process of law, in violation of the Fourteenth Amendment of the Federal Constitution.

In *Ney* v. *Scher,* 92 Wis. 40, 65 N. W. 854, it was said (p. 45):

> "Failure to remember, *entire forgetfulness to act as duty or interest requires, is so closely allied to laches or negligence* that it is difficult, if not impossible, in a case like the present, to distinguish between them. Indeed 'forgetfulness' is defined as *negligence,—careless omission.* Cent. Dict." (Emphasis ours.)

The order that everything remain in *"status quo"* was entered April 5, 1944 (Abst. 2). The order to consolidate the two actions was entered June 14, 1944 (Abst. 103; R. 23) and the *first* violation occurred July 17, 1944 (Abst. 3-4). This was not due to a loss of memory, and the loss of memory is no legal defense in support of the void orders which were entered in violation of the *status quo* order and without notice.

Respondent urges that irrespective of the allegations of the claims, the bank was indebted upon various commercial accounts even if there were no depositor claims, and that, therefore, the Appellate Court was correct in its second opinion. We have discussed all of the claims in the petition (pp. 20-21) and have shown conclusively by references to the record that *there were no commercial accounts in existence at the date of the filing of the complaint,* and respondent has not referred to any place in the record to justify his statement.

III.

The mismanagement of the respondent.

Respondent seeks to justify his mismanagement by orders of court which were entered *without notice* and in violation of the *status quo* order. We are not concerned at this time with the merits of the claims or compromises. The question before this court is whether orders which were entered allowing claims and compromising claims without notice, in violation of a *status quo* order, have any validity as to deprive the petitioners from collaterally attacking them in their proceedings in which the court acquired paramount and exclusive jurisdiction prior to the time when the orders were entered.

We are not going to burden this court with a reply as to point IV relating to the claim of collusion or to point V concerning the receiver's account, as these matters go to the merits of the controversy and were fully discussed in our briefs, and require no further reply.

Respectfully submitted,

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